

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MAUREEN A. SHIPLEY and U.S. POSTAL SERVICE,
BULK MAIL CENTER, San Francisco, CA

*Docket No. 98-994; Submitted on the Record;
Issued February 11, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review on November 17, 1997; and (2) whether the Office abused its discretion in denying appellant's request for an oral hearing.

On November 13, 1995 appellant, then a 40-year-old mail handler, filed a claim for compensation alleging that she became aware on October 18, 1995 that her stress and depression were caused by her removal from the employing establishment effective October 16, 1995. She submitted medical and factual evidence in support of her claim. The employing establishment also submitted information on the claim including a fitness-for-duty report from a psychiatrist.

In a decision dated August 15, 1996, the Office denied appellant's claim on the grounds that appellant did not submit sufficient medical evidence to establish that her condition was caused by factors of the federal employment. The Office attached a form indicating appellant's rights concerning petitions for reconsideration and the submission of new evidence.

In a letter postmarked July 15, 1997, appellant requested an oral hearing. Attached to her request was an April 29, 1997 medical report from Dr. Peter D. Tamulevich, a Board-certified psychiatrist and appellant's treating psychiatrist. In his report Dr. Tamulevich stated that appellant "suffered from severe stress at the workplace relating to superiors and coworkers" and that "[I]t is clear that she could no longer work at the bulk mail center in Richmond."

On September 10, 1997 the Office notified appellant that it was denying her request for an oral hearing on the grounds that it was untimely filed and was returning her case record to the appropriate district office. The Office noted further that it had considered her request and determined that the issue in her case could be addressed by filing a request for reconsideration.

On October 3, 1997 appellant requested reconsideration noting that she had initially requested reconsideration on August 9, 1997 and attached a copy of a signed mail receipt dated

August 13, 1997. She also requested information regarding the submission of new evidence. In her August 9, 1997 request, appellant noted that she was submitting two medical reports, one from Dr. Tamulevich which appellant stated was attached to her request, and one from Dr. Daniel Dinaburg, a Board-certified psychiatrist, which appellant noted would be sent from him directly to the Office. The Board notes that the October 3, 1997 request for reconsideration did not include a copy of Dr. Tamulevich's medical report.

On November 17, 1997 the Office, in a nonmerit decision, denied appellant's request for reconsideration on the grounds that appellant failed to establish that her claim for stress and depression was causally related to her employment for failure to identify compensable factors of employment which caused her condition. The Office further noted that because appellant failed to establish that her condition was caused by compensable work factors that further medical evidence was irrelevant to her claim.

The only decisions before the Board on this appeal are those of the Office dated November 17, 1997, which denied appellant's reconsideration request, and September 10, 1997 which denied her request for an oral hearing. As more than one year elapsed from the date of issuance of the Office's last merit decision, on August 15, 1996 and February 2, 1998, the date of appellant's appeal, the Board lacks jurisdiction to review that decision.¹

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on November 17, 1997.

Under section 8128(a) of the Federal Employees' Compensation Act,² the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,³ which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or a fact not previously considered by the Office;
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁴

¹ See 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8128.

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

In this case, appellant failed to raise any error of fact or law and failed to submit new relevant and pertinent evidence not previously considered by the Office in the prior decision. Although, she stated that she intended to submit medical evidence from Dr. Dinaburg, the record failed to disclose that he had submitted any medical report to the Office. Although Dr. Tamulevich's April 29, 1997 medical report was submitted as an attachment to appellant's request for oral hearing, that report merely stated a diagnosis and a recommendation that appellant not be permitted to return to the bulk mail center in Richmond and thus was not relevant to the issue of causation. The Board therefore finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

The Board further finds that the Office did not abuse its discretion in denying appellant's requests for an oral hearing.

Section 8124(a) of the Act provides, in pertinent part, that a "claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁵ The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁶

In this case, the Office issued its decision denying appellant's claim for compensation benefits on August 15, 1996. Appellant's letter requesting a hearing was postmarked July 15, 1997 which was beyond 30 days from the date that the August 15, 1996 decision was issued. Because appellant did not request a hearing within 30 days of the Office's August 15, 1996 decision, she was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion.⁷ In this case, the Office advised appellant that it considered this request in relation to the issue involved and the hearing was denied on the basis that the issues in the claim could be equally well resolved by a request for reconsideration. There is no evidence of an abuse of discretion in the denial of the hearing request in this case.

⁵ 5 U.S.C. § 8124(a).

⁶ *Henry Moreno*, 39 ECAB 475 (1988).

⁷ *William F. Osborne*, 46 ECAB 198 (1994); *Herbert C. Holley*, 33 ECAB 140 (1981).

The decisions of the Office of Workers' Compensation Programs dated November 17 and September 10, 1997 are hereby affirmed.

Dated, Washington, D.C.
February 11, 2000

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member